

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DYLAN HERRINGTON,
Plaintiff,
v.
TARGET CORPORATION,
Defendant.

Case No. 5:23-cv-01676-MRA-SHK

**ORDER GRANTING MOTION TO
DISMISS PLAINTIFF'S THIRD
AMENDED COMPLAINT WITH
PREJUDICE [ECF 33]**

Before the Court is Defendant Target Corporation's Motion to Dismiss Plaintiff Dylan Herrington's Third Amended Complaint (the "Motion"). ECF 33. The Court read and considered the Motion and deemed the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. The hearing on the Motion was therefore **VACATED** and removed from the Court's calendar. ECF 38. For the reasons stated herein, the Court **GRANTS** the Motion and **DISMISSES** this action with prejudice.

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I. FACTUAL & PROCEDURAL BACKGROUND¹

Plaintiff Dylan Herrington was formerly employed by Defendant Target Corporation. ECF 31 ¶¶ 3-4. On May 25, 2022, Plaintiff was called into a meeting with a manager named Greg. *Id.* ¶ 6. During the meeting, he was told that, if he interacted further with another employee, he would be fired. *Id.* The manager stated that Plaintiff was “inappropriate” with the other employee and did not understand consent. *Id.* Plaintiff discussed the meeting with other employees. *Id.* ¶ 7. The TAC alleges that “[Plaintiff] was in complete shock” after the meeting and “told other employees that, ‘[the manager] said I don’t know what consent means, no means no, I’m inappropriate, and if I look and [sic] [the other employee] I’m gonna get fired.’” *Id.* Plaintiff also “texted a lead what Greg had said to [him] and asked if [he] could talk to the HR ETL whose name is Cece Hernandez.” *Id.* This “lead” informed Plaintiff that he “[could] talk to Cece” in Human Resources (“HR”). *Id.*

Two weeks later, on June 8, 2022,² Plaintiff went to work and “felt as if fellow employees were staring at [him] and were being somewhat rude and hostile in how they [spoke] to [him], which made [him] feel very uneasy.” *Id.* ¶ 8. That day, Plaintiff met with Cece, the HR manager, to discuss this matter. *Id.* ¶ 8. Plaintiff asked what had happened with the other employee and why Greg had said to him that he did not know what consent means. *Id.* The HR manager confirmed that the other employee did not want Plaintiff to

¹ The factual background is described as alleged in Plaintiff's Third Amended Complaint ("TAC"). See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Daniels-Hall v. NEA*, 629 F.3d 992, 998 (9th Cir. 2010). When deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court is required to presume that all well-pleaded allegations are true, resolve all reasonable doubts and inferences in the pleader's favor, and view the pleading in the light most favorable to the non-moving party. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

² Plaintiff does not include the year in most dates pleaded in the TAC. The Court has deduced that Plaintiff is referring to dates in 2022 since the events giving rise to this action occurred within a three-week period beginning on May 25, 2022. *Id.* ¶¶ 6-8.

1 talk to her anymore. *Id.* The HR manager then asked Plaintiff what he had shared with
 2 other employees about the incident. *Id.* ¶ 9. The TAC states that Plaintiff told the HR
 3 manager the following: “I told people that [the other employee] had called me a pedophile
 4 and that I texted people that [the other employee] Called me a rapist.” *Id.* The HR manager
 5 then confirmed that this is what he had said to other employees and asked if Plaintiff’s
 6 manager, Greg, had told him not to tell other people. *Id.* The HR manager also told
 7 Plaintiff not to “text anyone about this” and that Plaintiff should talk to Greg. *Id.* Plaintiff
 8 did not want to talk to Greg, but the HR manager insisted that he do so. *Id.* The HR manager
 9 then called Greg into the office using a “walkie-talkie that everyone in the store uses to
 10 communicate with each other.” *Id.* ¶ 10. Plaintiff alleges that he confronted Greg about
 11 what he had said to him about not “know[ing] what consent means,” and that Greg said he
 12 did not say that to him, which Plaintiff said was a lie. *Id.*

13 Plaintiff alleges that “[a] couple of days later” he sent an email to Cece, the HR
 14 manager, asking for “a written statement from ETL Greg about what he had said to me.”
 15 *Id.* ¶ 13. But he then rescinded the request “[a]bout 15 minutes after sending the email”
 16 because he “decided [he] didn’t want to take legal action” and “instead wanted to see if
 17 there was a way to settle this out of court.” *Id.*

18 The following week, Plaintiff was called into a meeting with the store director and
 19 terminated from employment. *Id.* ¶¶ 13-14. Due to the stress of the incident, Plaintiff was
 20 hospitalized and received mental health treatment. *Id.* ¶ 18. Plaintiff then quit a separate
 21 job. *Id.* ¶ 19. On these allegations, Plaintiff brings claims against Defendant for
 22 defamation, retaliation, and a hostile work environment. *Id.* ¶¶ 21-29.

23 Defendant removed this action from the Riverside County Superior Court to federal
 24 court on August 18, 2023. *Id.* On August 25, 2023, Defendant moved to dismiss the
 25 Complaint, without opposition. ECF 11, 12. On October 23, 2023, this Court (Hon. Mark
 26 C. Scarsi presiding) granted the motion in open court, giving Plaintiff leave to amend the
 27 First Amended Complaint. ECF 17; ECF 23-1 at 7.
 28

1 Plaintiff, proceeding *pro se*, filed a Second Amended Complaint (“SAC”) on
2 November 6, 2023. ECF 18. On November 20, 2023, Defendant moved to dismiss the
3 SAC. ECF 23. On February 12, 2024, this Court (Hon. Mark C. Scarsi presiding) granted
4 dismissal in substantial part with leave to amend. ECF 29. The Court dismissed Plaintiff’s
5 hostile work environment and retaliation claims under the California Fair Employment and
6 Housing Act (“FEHA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”) for
7 failure to exhaust the administrative remedy process and, alternatively, for failure to state
8 a claim. ECF 29 at 2-4. Specifically, the Court held that Plaintiff had not alleged any facts
9 that plausibly show that he was harassed based on a protected status or that he engaged in
10 a protected activity. *Id.* at 3-4. The Court also dismissed Plaintiff’s defamation claim as
11 untimely and, alternatively, for failure to state a claim because Plaintiff consented to
12 publication of the allegedly defamatory statements. *Id.* at 5-6. The Court granted Plaintiff
13 leave to amend in part because Plaintiff represented that he had exhausted administrative
14 remedies, and that he would be able to allege defamatory statements that were not time-
15 barred. *Id.* at 6.

16 This action was reassigned to the undersigned district judge on February 23, 2024.
17 ECF 30. The operative Third Amended Complaint (“TAC”), filed on February 26, 2024,
18 now alleges that Plaintiff received a right-to-sue notice pursuant to the FEHA. ECF 31 ¶ 5.
19 Plaintiff now states that he “felt intimidated at his job due to unwelcome behavior in the
20 workplace” on May 25 and June 8, 2022, including “being threatened to be fired” and being
21 questioned through “the use of offensive words.” *Id.* ¶¶ 21-22. Plaintiff newly alleges that
22 this hostile work environment arose from harassment based on his sex or sexual orientation.
23 *Id.* ¶ 22. Plaintiff now claims that he learned of defamatory statements on June 8, 2022,
24 when meeting with the HR manager. *Id.* ¶ 25.

25 Defendant filed the instant Motion on March 11, 2024, arguing that Plaintiff’s claims
26 “remain fatally flawed,” therefore warranting dismissal with prejudice. ECF 33 at 5.
27 Plaintiff opposes the Motion. ECF 35. Defendant filed a Reply. ECF 37.
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1 **II. LEGAL STANDARDS**

2 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a
 3 claim upon which relief can be granted.” Dismissal is appropriate where the complaint
 4 lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *See*
 5 *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008). To survive
 6 a Rule 12(b)(6) motion to dismiss, a complaint must “state a claim to relief that is plausible
 7 on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial
 8 plausibility when the plaintiff pleads factual content that allows the court to draw the
 9 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
 10 *Iqbal*, 556 U.S. 662, 678 (2009) (per curiam). This is “a context-specific task that requires
 11 the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. The
 12 court “must accept as true all the factual allegations contained in the complaint,” but is “not
 13 bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S.
 14 at 678 (citing *Twombly*, 550 U.S. at 555). “Threadbare recitals of the elements of a cause
 15 of action, supported by mere conclusory statements, do not suffice.” *Id.*

16 A *pro se* pleading, however, shall be “liberally construed” and “held to less stringent
 17 standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94
 18 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *see also Lopez v. Smith*, 203
 19 F.3d 1122, 1130 (9th Cir. 2000) (en banc); *cf.* Fed. R. Civ. P. 8(f) (“All pleadings shall be
 20 so construed as to do substantial justice.”). The court has an obligation to afford the *pro*
 21 *se* complainant “the benefit of any doubt.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.
 22 2012) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)).

23 **III. DISCUSSION**

24 **A. Failure to State Defamation Claim**

25 Defendant argues that Plaintiff’s defamation claim is still time-barred, and even if it
 26 fell within the statute of limitations, Plaintiff consented to publication of the challenged
 27 statements. ECF 33-1 at 8-10. The Court considers each argument in turn.

1 1. Statute of Limitations

2 Under California law, an “action for libel [or] slander” must be brought “[w]ithin
 3 one year.” Cal. Civ. Proc. Code § 340(c). “An action is commenced . . . when the
 4 complaint is filed.” *Id.* § 350. “In a claim for defamation, as with other tort claims, the
 5 period of limitations commences when the cause of action accrues.” *Shively v. Bozanich*,
 6 31 Cal. 4th 1230, 1246 (2003). “[A] cause of action for defamation accrues at the time the
 7 defamatory statement is published.” *Id.* at 1247 (internal quotation marks omitted). “[T]he
 8 general rule is that publication occurs when the defendant communicates the defamatory
 9 statement to a person other than the person being defamed.” *Id.* A statute of limitations is
 10 an affirmative defense. *See Minton v. Cavaney*, 56 Cal. 2d 576, 581 (1961). An affirmative
 11 defense “can serve as the basis for dismissing a complaint at the pleadings stage under Rule
 12(b)(6) only when the elements of the defense appear on the face of the complaint.” *Puri*
 13 *v. Khalsa*, 844 F.3d 1152, 1158 (9th Cir. 2017) (emphasis omitted) (citation omitted).

14 In the TAC, Plaintiff alleges that a manager, Greg, confronted him on May 25, 2022,
 15 to warn him that, if he interacted further with another employee, he would be fired. ECF
 16 31 ¶ 6. The manager stated that Plaintiff was “inappropriate” with the other employee and
 17 did not understand consent. *Id.* ¶ 7. Two weeks later, on June 8, 2022, Plaintiff informed
 18 an HR manager that he had shared with other employees what his manager had told him
 19 on May 25. *Id.* ¶ 9 (“I told people that [the other employee] had called me a pedophile and
 20 that I texted people that [the other employee] Called me a rapist.”). Based on these facts,
 21 it is not clear whether *Defendant*, as opposed to Plaintiff, communicated any allegedly
 22 defamatory statements to a person other than Plaintiff during these meetings. Plaintiff
 23 nevertheless alleges that he learned of defamatory statements “that other employees were
 24 saying” on June 8, 2022, when he met with the HR manager. ECF 31 ¶ 25 (“HR stated as
 25 a fact, that other employees were saying that I said to them that [the other employee] called
 26 me a pedophile.”).

27 The state court documents attached to Defendant’s Notice of Removal indicate that
 28 Plaintiff first filed this action on June 2, 2023. The summons and civil case cover sheet

1 are stamped as filed on June 2, 2023. ECF 1-2 at 2, 9-10. The clerk of court also dated the
 2 notice of case management conference on June 2, 2023. *Id.* at 11-12. As noted in the prior
 3 dismissal Order, the state court docket contains a “1st amended complaint,” which was
 4 filed on June 21, 2023. ECF 39 at 5.

5 On these limited facts, the Court cannot determine with certainty whether Plaintiff
 6 filed this action within the statute of limitations. If the purportedly false statements were
 7 communicated to third parties by Defendant before June 2, 2022, they are time-barred, but
 8 if they were communicated on June 8, 2022, as Plaintiff alleges, they are not, because there
 9 is sufficient evidence that Plaintiff filed this action on June 2, 2023, within one year of the
 10 cause of action accruing. As such, the Court cannot dismiss the defamation claim at this
 11 stage *on this ground* under Rule 12(b)(6).

12 2. Consent to Publication

13 “One of the oldest and most widely recognized defenses to the publication of
 14 defamatory matter is the doctrine of consent.” *Royer v. Steinberg*, 90 Cal. App. 3d 490,
 15 498 (1979); *see also* Cal. Civ. Code § 3515 (“He who consents to an act is not wronged by
 16 it.”). Consent applies “where a statement made privately to the plaintiff is published solely
 17 through the actions and effort of the plaintiff.” *Royer*, 90 Cal. App. 3d at 498. As with a
 18 statute of limitations defense, consent can serve as the basis for dismissal when “the
 19 elements of the defense appear on the face of the complaint.” *Puri*, 844 F.3d at 1158.

20 The Court previously held that Plaintiff consented to publication of the allegedly
 21 defamatory statements. ECF 29 at 5-6. The TAC does not alter this determination. The
 22 TAC alleges that defamatory statements were communicated to Plaintiff in private
 23 meetings on May 25, 2022, and June 8, 2022. ECF 31 ¶¶ 6, 9. As to the May 25, 2022,
 24 incident, Plaintiff now alleges that, instead of telling other employees generally what had
 25 happened during the meeting after-the-fact, he in fact explicitly repeated the purportedly
 26 defamatory statements to other employees. *Compare* ECF 18 (SAC) ¶ 6 (“I told other
 27 employees what had happened”) *with* ECF 31 (TAC) ¶ 7 (“I told other employees that,
 28 [the manager] said I don’t know what consent means, no means no, I’m inappropriate, and

1 if I look a (sic) [the other employee] I'm gonna get fired.””). At the June 8, 2022, meeting,
 2 when asked by the HR manager, Plaintiff admits that he had discussed the incident with
 3 other people. *Id.* ¶ 9 (“I didn’t text anyone about this except the leads”); *see id.* (stating
 4 that the HR manager made Plaintiff feel as if he “had done something wrong by telling
 5 other employees about what had happened [at the May 25, 2022 meeting”]). Thus,
 6 Plaintiff’s TAC only reaffirms what this Court previously concluded: “Plaintiff consented,
 7 in a legal sense, to those statements.” ECF 29 at 5.

8 In his Opposition, Plaintiff contends that he did not consent to publication of the
 9 challenged statements because he repeated the statements to the employees who he
 10 believed had made the false accusations. ECF 35 at 7. It is true that confronting a purported
 11 defamer with allegedly defamatory statements would not constitute consent by publication.
 12 *See Shively*, 31 Cal. 4th at 1247 (noting that publication requires communication of the
 13 defamatory statement to a third party). However, Plaintiff’s argument is not consistent
 14 with the TAC, and therefore lacks credibility. *See Sprewell v. Golden State Warriors*, 266
 15 F.3d 979, 988 (9th Cir. 2001) (explaining that a court is not “required to accept as true
 16 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 17 inferences”). The TAC alleges that, after ending his shift on May 25, 2022, Plaintiff texted
 18 a manager about what was discussed at the meeting earlier that day. ECF 31 ¶ 7. Plaintiff
 19 does not allege that the manager he texted had defamed him or that he intended to confront
 20 her with any defamatory statements. *See id.* Rather, he texted her to arrange a meeting
 21 with HR. *Id.* In addition, Plaintiff acknowledges repeating the purportedly defamatory
 22 statements to employees in the plural. *Id.* Having published statements that were made
 23 privately, Plaintiff cannot now claim to have been legally wronged by their utterance. *See*
 24 Cal. Civ. Code § 3515.

25 Accordingly, the Court dismisses the defamation claim on this ground.

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1 **B. Failure to State Retaliation and Hostile Work Environment Claims**

2 Defendant contends that although Plaintiff has now alleged facts indicating
 3 exhaustion of administrative remedies, he still has no legal basis to bring retaliation and
 4 hostile work environment claims under FEHA and Title VII. ECF 33 at 10-12.

5 Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice
 6 for an employer ... to discriminate against any individual with respect to his compensation,
 7 terms, conditions, or privileges of employment, because of such individual’s race, color,
 8 religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). “While the wording of Title
 9 VII and the FEHA differs in some particulars, . . . the antidiscriminatory objectives and
 10 overriding public policy purposes of the two acts are identical.” *Lyle v. Warner Bros.
 11 Television Prods.*, 38 Cal. 4th 264, 278 (2006).

12 1. Hostile Work Environment

13 FEHA and Title VII can be violated “[w]hen the workplace is permeated with
 14 discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to
 15 alter the conditions of the victim’s employment and create an abusive work environment.”
 16 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citation and quotation marks
 17 omitted); *accord Lyle*, 38 Cal. 4th at 279.

18 Plaintiff now claims that he experienced a hostile work environment based on his
 19 sex or sexual orientation. ECF 31 ¶ 22. To state a hostile work environment claim based
 20 on sex under Title VII and the FEHA, a plaintiff must show that she was subjected to sexual
 21 advances, conduct, or comments that were (1) unwelcome; (2) because of sex; and
 22 (3) sufficiently severe or pervasive to alter the condition of her employment and create an
 23 abusive work environment; and (4) that the offending conduct was imputable to her
 24 employer. *Lyle*, 38 Cal. 4th at 279 (observing that the same standard for a hostile work
 25 environment sexual harassment claim applies in the Title VII and the FEHA contexts).

26 As this Court previously held, Plaintiff has not alleged harassment based on a
 27 protected status. *See* ECF 29 at 6. Plaintiff claims that he was harassed on two occasions.
 28 ECF 31 ¶ 21. On May 25, 2022, he was told that he was “inappropriate” and that he did

1 not understand what consent means. *Id.* ¶¶ 6, 21. On June 8, 2022, he alleges that the HR
 2 manager used “offensive words”—rapist and pedophile—in a “questioning tone.” *Id.* ¶ 22.
 3 Neither incident constitutes actionable harassment. The use of the term “pedophile” does
 4 not fall within the definition of sexual orientation. *See Cal. Gov’t Code § 12926(s)*
 5 (defining “sexual orientation” to mean “heterosexuality, homosexuality, and bisexuality”).
 6 As for harassment based on sex, the Supreme Court has explained that “workplace
 7 harassment, even harassment between men and women, is not automatically discrimination
 8 because of sex merely because the words used have sexual content or connotations.”
 9 *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Here, Plaintiff alleges
 10 facts that at best lead to the plausible inference that the remarks made were “tinged with
 11 offensive sexual connotations,” *id.* at 81, but he has not shown that the conduct “actually
 12 constituted ‘discriminat[ion] . . . because of . . . sex,’” *id.* (quoting 42 U.S.C. § 2000e—
 13 2(a)(1)).

14 Moreover, the two isolated incidents complained of do not amount to conduct
 15 “severe or pervasive enough to create an objectively hostile or abusive work environment.”
 16 *Harris*, 510 U.S. at 21; *see also Lyle*, 38 Cal. 4th at 283 (“[A]n employee generally cannot
 17 recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee
 18 must show a concerted pattern of harassment of a repeated, routine, or a generalized
 19 nature.”); *Herberg v. Cal. Inst. of the Arts*, 101 Cal. App. 4th 142, 151 (2002) (“[A] single
 20 incident must be severe in the extreme and generally must include either physical violence
 21 or the threat thereof.”). “[M]ere utterance of an . . . epithet which engenders offensive
 22 feelings in a[n] employee, does not sufficiently affect the conditions to employment to
 23 implicate Title VII.” *Harris*, 510 U.S. at 22 (citation and internal quotation marks omitted).
 24 Plaintiff states that these incidents made him feel “verbally abused,” “unwelcomed,”
 25 “intimidated,” and “threatened.” ECF 31 ¶¶ 6, 21-22. But “[t]o be actionable, ‘a sexually
 26 objectionable environment must be both objectively and subjectively offensive.’” *Lyle*, 38
 27 Cal. 4th at 284 (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998)). Plaintiff may
 28 “subjectively perceive[] the workplace as hostile or abusive,” but he cannot prevail “if a

1 reasonable person in the plaintiff's position, considering all the circumstances, would not
 2 share the same perception." *Id.*

3 Plaintiff's TAC does not raise a plausible inference that Plaintiff experienced
 4 harassment based on a protected status, or that the harassment was so pervasive and severe
 5 as to create a genuinely hostile work environment. Thus, the Court dismisses Plaintiff's
 6 hostile work environment claim.

7 2. Retaliation

8 To plead a *prima facie* case of retaliation under the FEHA, "a plaintiff must show
 9 (1) he or she engaged in a protected activity, (2) the employer subjected the employee to
 10 an adverse employment action, and (3) a causal link existed between the protected activity
 11 and the employer's action." *Nealy v. City of Santa Monica*, 234 Cal. App. 4th 359, 380
 12 (2015) (citation and internal quotation marks omitted). A substantially similar standard
 13 applies to retaliation claims under Title VII. *See E.E.O.C. v. Dinuba Med. Clinic*, 222 F.3d
 14 580, 586 (9th Cir. 2000).

15 Under the FEHA, "[p]rotected activity" includes "[o]pposing employment practices
 16 that an individual reasonably believes to exist and believes to be a violation of [FEHA]"
 17 and "[p]articipating in an activity that is perceived by the employer . . . as opposition to
 18 discrimination[.]" Cal. Code Regs. tit. 2, § 11021 (a)(1). Likewise, under Title VII's anti-
 19 retaliation provision, "a complaint by an employee that a supervisor has violated Title VII
 20 may constitute protected activity for which the employer cannot lawfully retaliate." *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 963 (9th Cir. 2009) (holding that an
 21 employee's internal complaint to a human resources representative about supervisors'
 22 purported discriminatory comments amounts to protected activity under Title VII); *see also*
 23 *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000) ("[A]sserting one's civil
 24 rights . . . is a protected activity under Title VII and FEHA."). Informal complaints to HR
 25 about a supervisor's behavior can constitute a protected activity, provided the plaintiff
 26 reasonably believes the alleged misconduct complained of violates FEHA and Title VII.
 27 *See Garcia v. Los Banos Unified Sch. Dist.*, 418 F. Supp. 2d 1194, 1224 (E.D. Cal. 2006)

1 (finding that plaintiff engaged in protected activity when she complained to a supervisor
 2 about sexually derogatory comments). However, a complaint about a supervisor's lack of
 3 professionalism, without more, does not constitute protected activity. *See Day v. Sears*
 4 *Holdings Corp.*, 930 F. Supp. 2d 1146, 1176-77 (C.D. Cal. 2013) (holding that plaintiff's
 5 complaints about unprofessional conduct, such as inappropriate conversations regarding
 6 girlfriends and infidelity, does not constitute protected activity).

7 Plaintiff has not alleged facts that plausibly indicate he engaged in protected activity.
 8 Plaintiff argues that he engaged in protected activity when he complained to HR about the
 9 May 25, 2025, incident involving Greg. ECF 35 at 4. Specifically, the TAC alleges that
 10 Plaintiff asked the HR manager what the complaining employee had said happened and
 11 why Greg said that he did not know what consent means. ECF 31 ¶ 8. He did not complain
 12 of any conduct that objectively constitutes harassment or discrimination based on a
 13 protected status, or any other employment practice proscribed under FEHA and Title VII.
 14 As explained above, while Greg's comments may have been subjectively perceived by
 15 Plaintiffs as unsavory and unprofessional, they were not objectively unlawful under FEHA
 16 and Title VII. *See Lyle*, 38 Cal. 4th at 280 ("[I]t is disparate treatment of an employee on
 17 the basis of sex—not the mere discussion of sex or use of vulgar language—that is the
 18 essence of a sexual harassment claim.").

19 Thus, Plaintiff has not alleged facts to demonstrate that he engaged in protected
 20 activity. Accordingly, the Court dismisses Plaintiff's retaliation claim.

21 C. Leave to Amend

22 Federal Rule of Civil Procedure 15(a) provides that after a party has amended a
 23 pleading once as a matter of course, it may amend further only after obtaining leave of the
 24 court or by consent of the adverse party. In general, "[t]he court should freely give leave
 25 when justice so requires." Fed. R. Civ. P. 15(a)(2). "This policy is to be applied with
 26 extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.
 27 2001) (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.
 28 1990)). "[I]n dismissing for failure to state a claim under Rule 12(b)(6), 'a district court

1 should grant leave to amend even if no request to amend the pleading was made, unless it
 2 determines that the pleading could not possibly be cured by the allegation of other facts.””
 3 *Lopez*, 203 F.3d at 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497
 4 (9th Cir. 1995)). Moreover, “a district court should not dismiss a pro se complaint without
 5 leave to amend unless ‘it is absolutely clear that the deficiencies of the complaint could not
 6 be cured by amendment.’” *Akhtar*, 698 F.3d at 1212 (quoting *Shucker v. Rockwood*, 845
 7 F.2d 1202, 1203-04 (9th Cir. 1988) (per curiam)).

8 Notwithstanding the liberal standard under Rule 15(a), leave is “not to be granted
 9 automatically.” *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th
 10 Cir. 2013) (quoting *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)), *aff’d*
 11 *sub nom. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015). In determining whether to grant
 12 leave to amend, courts balance the following factors: (1) undue delay; (2) bad faith or
 13 dilatory motive of the moving party; (3) repeated failure to cure deficiencies by
 14 amendments previously allowed; (4) undue prejudice to the non-moving party by virtue of
 15 allowance of the amendment; and (5) futility of amendment. *Eminence Capital, LLC v. Asepon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam) (quoting *Foman v. Davis*,
 16 371 U.S. 178, 182 (1962)) (quotation marks omitted).

17 On balance, the *Foman* factors favor dismissal in this case. To be sure, Plaintiff has
 18 not acted with bad faith or dilatory motive. Nor has Defendant stated that it would be
 19 prejudiced by further amendment. However, Defendant argues that Plaintiff should be
 20 denied leave to amend because he “has had multiple opportunities to amend his pleadings,
 21 and with his most recent amendment, he has failed to allege any new or substantive facts
 22 to support his claims.” ECF 33-1 at 12.

23 The Court agrees that Plaintiff’s failure to cure previously identified deficiencies
 24 despite previous rounds of motions to dismiss and dismissal orders indicates that an
 25 additional round of amendment would be futile. The Court’s most recent dismissal order
 26 provided Plaintiff with notice of the deficiencies in his pleading and gave him the
 27 opportunity to amend. *See generally* ECF 29. At that time, the Court cautioned Plaintiff

1 that “[f]urther failure to state a claim may render subsequent amendment futile.” *Id.* at 6.
2 In the TAC, Plaintiff cured some, but not all, of the Court’s previous findings. *See* ECF
3 31 ¶ 5. As discussed above, Plaintiff did not dispel the Court’s prior determinations that
4 he had not engaged in protected activity or experienced harassment based on a protected
5 status and that he consented to publication of the allegedly defamatory statements through
6 his unilateral conduct. Thus, even under the liberal Rule 15(a) standard, it is “absolutely
7 clear” that Plaintiff could not cure, by further amendment, the deficiencies identified in this
8 and prior Orders. *Akhtar*, 698 F.3d at 1212 (citation omitted). Accordingly, the Court
9 denies Plaintiff leave to amend.

10 **IV. CONCLUSION**

11 For the foregoing reasons, Defendant’s Motion to Dismiss Plaintiff’s Third
12 Amended Complaint is **GRANTED** without leave to amend. The Court hereby
13 DISMISSES this action with prejudice and further ORDERS the Clerk to treat this Order
14 as an entry of judgment. L.R. 58-6.

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16 **IT IS SO ORDERED.**

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18 Dated: June 28, 2024

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20 HON. MÓNICA RAMÍREZ ALMADANI
21 UNITED STATES DISTRICT JUDGE

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